IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant(s):	Boza et al.
Appl. No.:	09/646,748
Conf. No.:	7778
Filed:	December 11, 2000
Title:	METHOD FOR PROVIDING GLUTAMINE
Art Unit:	1654
Examiner:	A. Mohamed
Docket No.:	112701-036

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

RESPONSE TO NON-COMPLIANT APPEAL BRIEF

Sir:

This Response is submitted in reply to the Notice of Non-Compliant Appeal Brief dated June 20, 2007.

REMARKS

In response to the Notice of Non-Compliant Appeal Brief dated June 20, 2007, Appellants have corrected the inconsistency between Section D of the argument section and the claims on appeal to address the informality cited by the Patent Office. The compliant version of the Appeal Brief is attached as Exhibit A without copies of the cited references, which were previously submitted.

Appellants submit that the present Appeal Brief is compliant under 37 CFR 41.37. Appellants respectfully request reconsideration of the Appeal Brief and submit that the Patent Office has failed to establish anticipation and a *prima facie* case of obviousness with respect to the rejections of the claimed invention. Accordingly, Appellants respectfully submit that the anticipation and obviousness rejections are erroneous in law and in fact and should therefore be reversed.

The Director is authorized to charge any fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-36 on the account statement.

Respectfully submitted,

BELL, BOYD & LLOYD LLC

BY _____
Robert M. Barrett
Reg. No. 30,142
Customer No. 29157

Dated: July 3, 2007

THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Appellant(s):	Boza et al.
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APPELLANTS' APPEAL BRIEF

Sir:

Appellants submit this Appeal Brief in support of the Notice of Appeal filed on March 13, 2007. This Appeal is taken from the Final Rejection in the Office Action dated October 16, 2006.

I. REAL PARTY IN INTEREST

The real party in interest for the above-identified patent application on Appeal is Nestec, Ltd. by virtue of an Assignment dated December 11, 2000 and recorded at reel 011372, frame 0309 in the United States Patent and Trademark Office.

II. RELATED APPEALS AND INTERFERENCES

Appellants' legal representative and the Assignee of the above-identified patent application do not know of any prior or pending appeals, interferences or judicial proceedings which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision with respect to the above-identified Appeal.

III. STATUS OF CLAIMS

Claims 1-16 are pending in the above-identified patent application. Claims 1-16 stand rejected. Therefore, Claims 1-16 are being appealed in this Brief. A copy of the appealed claims is included in the Claims Appendix.

IV. STATUS OF AMENDMENTS

A final Office Action was mailed on October 16, 2006. Appellants filed a response to the final Office Action on January 3, 2007 with no amendments to the claims. An Advisory Action was mailed on February 6, 2007. In the Advisory Action, the response was considered but the Examiner maintained the previous rejection. Appellants filed a Notice of Appeal on March 13, 2007. A copy of the final Office Action and the Advisory Action are attached as Exhibit A and Exhibit B, respectively, in the Evidence Appendix.

V. SUMMARY OF CLAIMED SUBJECT MATTER

A summary of the invention by way of reference to the specification and/or figures for each of the independent claims is provided as follows:

Independent Claim 1 is directed to a method for increasing plasma glutamine concentration in a stressed mammal (page 1, lines 3-7), the method comprising the step of administering to the stressed mammal a nutritional composition (page 6, lines 17-24) including a protein source having at least 80% by weight of a component selected from the group consisting of whey protein (page 2, line 35 to page 3, line 11; page 3, line 34 to page 4, line 23; page 4, lines 24-35), and a protein mixture which simulates the amino acid profile of whey protein consisting of approximately 80% to about 90% by weight of casein, approximately 0.5% to about 2% by weight of isoleucine, about 2% to about 8% by weight of leucine, about 1% to about 5% by weight of cysteine, and about 1% to about 5% by weight of lysine (page 3, line 34 to page 4, line 23).

Independent Claim 2 is directed to a method for increasing muscle glutamine concentrations in a mammal (page 3, lines 16-20), the method comprising the step of administering to the mammal a nutritional composition (page 6, lines 17-24) including a protein source having at least 80% by weight of a component selected from the group consisting of whey protein (page 3, lines 16-20; page 3, line 34 to page 4, line 23; page 4, lines 24-35), and a protein mixture which simulates the amino acid profile of whey protein consisting of approximately 80% to about 90% by weight of casein, approximately 0.5% to about 2% by weight of isoleucine, about 2% to about 8% by weight of leucine, about 1% to about 5% by weight of cysteine, and about 1% to about 5% by weight of lysine (page 3, line 34 to page 4, line 23).

Independent Claim 3 is directed to a method for providing glutamine to a mammal suffering from injured, diseased or under-developed intestines (page 3, lines 21-26), the method comprising the step of administering to the mammal a nutritional composition (page 6, lines 17-24) including a protein source having at least 80% by weight of a component selected from the group consisting of whey protein (page 3, line 34 to page 4, line 23; page 4, lines 24-35), and protein mixture which simulates the amino acid profile of whey protein consisting of approximately 80% to about 90% by weight of casein, approximately 0.5% to about 2% by weight of isoleucine, about 2% to about 8% by weight of leucine, about 1% to about 5% by

weight of cysteine, and about 1% to about 5% by weight of lysine (page 3, line 34 to page 4, line 23).

Although specification citations are given in accordance with C.F.R. 1.192(c), these reference numerals and citations are merely examples of where support may be found in the specification for the terms used in this section of the Brief. There is no intention to suggest in any way that the terms of the claims are limited to the examples in the specification. As demonstrated by the references numerals and citations, the claims are fully supported by the specification as required by law. However, it is improper under the law to read limitations from the specification into the claims. Pointing out specification support for the claim terminology as is done here to comply with rule 1.192(c) does not in any way limit the scope of the claims to those examples from which they find support. Nor does this exercise provide a mechanism for circumventing the law precluding reading limitations into the claims from the specification. In short, the references numerals and specification citations are not to be construed as claim limitations or in any way used to limit the scope of the claims.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

1. Claims 1-2 and 6 are rejected under 35 U.S.C. §102(b) as being anticipated by the publication of 100% Whey Proteins 5 lbs by Optimum Nutrition ("*Optimum Nutrition*"). A copy of *Optimum Nutrition* is attached herewith as Exhibit C in the Evidence Appendix.

2. Claims 1-16 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Optimum Nutrition* in view of U.S. Patent No. 5,849,335 to Ballevre et al. ("*Ballevre*"). A copy of *Ballevre* is attached herewith as Exhibit D in the Evidence Appendix.

VII. ARGUMENT

A. LEGAL STANDARDS

1. Anticipation under 35 U.S.C. § 102(b)

Under 35 U.S.C. § 102(b) an invention is not patentable if it has been "patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application of patent in the United States." For example, an invention is not patentable if the claimed subject matter is "anticipated" by the prior art. Anticipation requires that a single prior art reference discloses each and every limitation of the claimed invention. *Schering Corp. v. Geneva Pharms., Inc.*, 339 F.3d 1373, 1377, 67 USPQ2d 1664 (Fed. Cir. 2003). The reference needs to "be enabling and describe the applicant's claimed invention sufficiently to have placed it in possession of a person of ordinary skill in the field of the invention." *ArthroCare Corp. v. Smith & Nephew Inc.*, 406 F.3d 1365, 1372, 74 USPQ2d 1749 (Fed. Cir. 2005) (quoting *In re Paulsen*, 30 F.3d 1475, 1479, 31 USPQ2d 1671 (Fed. Cir. 1994)).

2. Obviousness under 35 U.S.C. §103

The Federal Circuit has held that the legal determination of an obviousness rejection under 35 U.S.C. § 103 is:

> whether the claimed invention as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made...The foundational facts for the prima facie case of obviousness are: (1) the scope and content of the prior art; (2) the difference between the prior art and the claimed invention; and (3) the level of ordinary skill in the art...Moreover, objective indicia such as commercial success and long felt need are relevant to the determination of obviousness...Thus, each obviousness determination rests on its own facts.

In re Mayne, 41 U.S.P.Q. 2d 1451, 1453 (Fed. Cir. 1997).

In making this determination, the Patent Office has the initial burden of proving a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q. 2d 1955, 1956 (Fed. Cir. 1993). This burden may only be overcome "by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that

individual to combine the relevant teachings." *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). "If the examination at the initial stage does not produce a prima facie case of unpatentability, then without more the applicant is entitled to grant of the patent." *In re Oetiker*, 24 U.S.P.Q. 2d 1443, 1444 (Fed. Cir. 1992).

Of course, references must be considered as a whole and those portions teaching against or away from the claimed invention must be considered. *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve Inc.*, 796 F.2d 443 (Fed. Cir. 1986). "A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the Applicant." *Monarch Knitting Machinery Corp. v. Fukuhara Industrial Trading Co., Ltd.*, 139 F.3d 1009 (Fed. Cir. 1998), quoting, *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994).

B. THE CLAIMED INVENTION

Independent Claims 1-3 recite, in part, a method comprising the step of administering a nutritional composition including a protein source having at least 80% by weight of a component selected from the group consisting of whey protein and a protein mixture which simulates the amino acid profile of whey protein consisting of approximately 80% to about 90% by weight of casein. Appellants have surprisingly discovered that the administration of nutritional compositions that contain whey protein, or a protein mixture which simulates the amino acid profile of whey protein, as a protein source increases plasma glutamine levels in humans or animals. This is despite the fact that whey protein contains relatively low amounts of glutamine. Further, nutritional compositions that contain whey protein as a protein source provide glutamine levels much higher than those provided by nutritional compositions containing free amino acids including glutamine as protein source.

C. THE REJECTIONS OF CLAIMS 1-2 AND 6 UNDER 35 U.S.C. §102(b) SHOULD BE REVERSED BECAUSE *OPTIMUM NUTRITION* AS EVIDENCED BY *COSTELLO'S* IS NOT PROPER PRIOR ART

1. The product disclosed by *Optimum Nutrition* was not on sale or publicly disclosed before the priority date of the present application because the product disclosed in *Optimum Nutrition* is not the same product disclosed in *Costello's*

Appellants respectfully submit that the earlier version of *Optimum Nutrition* (e.g., the product featured in the publication by Costello's ("*Costello's*" attached as Exhibit E) and cited by the Examiner in the supplemental Office Action dated May 8, 2006) is not identical in formulation to the *Optimum Nutrition* being relied upon in the final Office Action dated October 16, 2006. For example, the whey protein product from *Optimum Nutrition* being relied upon in the final Office Action states that the formulation is "better than ever," which suggests that the formulation has been modified from an earlier version. Furthermore, the website for *Optimum Nutrition* currently discloses that the most recent formulation of the whey protein product is the third generation of *Optimum Nutrition* whey protein products. See, bodybuilding.com attached as Exhibit F.

If the whey protein product being relied upon in the final Office Action is, in fact, the second version of the *Optimum Nutrition* whey protein product, there is no definitive proof that this second version is the same formulation as the product featured in *Costello's* and that the exact product disclosed in *Optimum Nutrition* was on sale before the priority date of the present application. For example, the specific nutritional formulation of the catalogued whey protein nutrition product sold by *Costello's* is not disclosed or taught in any of the references cited by the Examiner. It remains possible that *Costello's* nutritional product referred to by the Examiner does not disclose or suggest a protein source having at least 80% by weight of a whey protein or a protein mixture which simulates the amino acid profile of whey protein as required, in part, by the present claims. Instead, *Costello's* nutritional product may also provide additional protein sources besides whey protein that amount to more than 20% of the total protein source.

In sum, Appellants respectfully submit that the *Optimum Nutrition* product formulation cited against the pending application is, in fact, not the same *Optimum Nutrition* product formulation sold by *Costello's* cited by the Examiner. Accordingly, Appellants respectfully

submit that the product disclosed by *Optimum Nutrition* was not on sale or publicly disclosed before the priority date of the present application (i.e. March 31, 1998) and therefore does not anticipate the present claims.

2. *Optimum Nutrition* as evidenced by *Costello's* fails to disclose or suggest every element of Claim 1

Appellants respectfully submit that *Optimum Nutrition* as evidenced by *Costello's* fails to disclose or suggest a method for increasing plasma glutamine concentration in a stressed mammal as required, in part, by Claim 1. In fact, *Optimum Nutrition* as evidenced by *Costello's* fails to disclose or suggest administering its compound to any stressed mammal, for example, to increase its plasma glutamine concentration in accordance with Claim 1.

D. THE REJECTIONS OF CLAIMS 1-16 UNDER 35 U.S.C. §103(a) SHOULD BE REVERSED BECAUSE THE EXAMINER HAS NOT ESTABLISHED A *PRIMA FACIE* CASE OF OBVIOUSNESS

1. One having ordinary skill in the art would not be motivated to combine the cited references to arrive at the present claims

Appellants respectfully submit that the Examiner has failed to consider the references as a whole and those portions teaching against or away the combination and from the claimed invention. Instead, the Examiner has improperly attempted to combine references that have different intended purposes and/or distinct modes of operation. As a result, Appellants submit that one having ordinary skill in the art would not be motivated to combine *Optimum Nutrition* as evidenced by *Costello's* and *Ballevre* to arrive at the present claims.

The whole premise of *Ballevre* is that carob protein is rich in glutamine and that its nutritional composition for improving plasma glutamine should include carob protein. *Ballevre* further teaches that its mixture of carob and whey proteins uses whey protein as the minor rather than the major component. See, *Ballevre*, column 4, lines 27-35; Example 2. For example, *Ballevre* discloses that carob protein comprises about 40% to about 100% by weight of the protein source of its nutritional composition, which results in the protein source in *Ballevre*

containing a minimum of "about 40%" of the protein source of carob. Because *Ballevre* teaches that it is essential to retain carob protein, it teaches away from a combination with *Optimum Nutrition* that is directed to a product comprising 100% whey proteins to assist in body building.

Moreover, if the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984). This certainly applies here where one of the cited references is directed to a product that must comprise some and preferably a majority of carob protein (*Ballevre*) and the other cited reference is directed to a product comprising only whey protein (*Optimum Nutrition*) for body building. The specific formulation for each product as taught by the cited references is important and specific to that particular product. Because of these differences, one skilled in the art would not be motivated to modify or combine *Optimum Nutrition* and *Ballevre* to arrive at the present claims.

In sum, the cited references above are directed to completely different objectives and modes of operation. For at least the reasons discussed above, the combination of the cited references is improper.

2. Even if combinable, the cited references fail to disclose or suggest all of the elements of the claimed invention

Appellants respectfully submit that *Ballevre* and *Optimum Nutrition* as evidenced by *Costello's* fail to disclose or suggest every element of independent Claims 1 and 3. For example, *Ballevre* fails to disclose or suggest a method for increasing plasma glutamine concentration in a stressed mammal as required, in part, by Claim 1. *Ballevre* also fails to disclose or suggest a method for providing glutamine to a mammal suffering from injured, diseased or under-developed intestines as required, in part, by Claim 3.

As stated in Appellants' specification, the present invention is based on the surprising discovery that feeding whey protein to stressed or injured/diseased mammals, for example, in need of glutamine supplementation improves plasma glutamine status more than would be expected with regard to the lower amounts of glutamine present in whey protein. See, specification, page 3, lines 4-11. As is observed from Example 2 of Appellants' specification and known by one having ordinary skill in the art, whey protein contains a lower proportion of

glutamine than both casein and soy protein, yet better plasma and muscle glutamine status is obtained by feeding whey protein than by feeding casein and soy proteins. Thus, the present claims are directed to a novel way of increasing glutamine levels in stressed or injured/diseased mammals using whey protein or a protein mixture which simulates the amino acid profile of whey protein and not simply a way of supplementing with free glutamine.

In contrast to the present claims, *Ballevre* is directed to carob protein comprises about 40% to about 100% by weight of the protein source of its nutritional composition, which results in the protein source in *Ballevre* containing a minimum of "about 40%" of the protein source of carob. This means that the theoretical maximum whey or casein content would be about 60% (e.g. 100% - 40% = 60%) because carob protein comprises the majority of the protein source. This is a difference of 20% from what the present claims require and therefore does not reasonably fall within the "approximate" range. Moreover, the description of *Ballevre* in any event teaches away from this by teaching a maximum whey content (or mixture of whey and casein) of 30% of the protein source, which is even further from the claimed ranges. See, *Ballevre*, column 4, lines 28-36. As a result, Appellants respectfully submit that *Ballevre* fails to disclose or suggest the claimed methods of administering to a stressed or injured/diseased mammal a nutritional composition having the claimed ranges of whey protein OR a mixture which simulates the amino acid profile of whey protein.

Further, *Ballevre* is entirely directed to the use of a protein source comprising carob protein, which is rich in glutamine. As a result, it teaches away from Appellants' present claims wherein the protein source contains a low concentration of glutamine (e.g. because the protein source comprises at least 80% by weight whey protein). See, *Ballevre*, Abstract and column 2, lines 33-42. In fact, *Ballevre* is concerned with a glutamine rich nutritional composition used for glutamine supplemented diets. See, *Ballevre*, column 2, lines 27-30.

Optimum Nutrition as evidenced by *Costello's* also fails to disclose or suggest every element of the claimed invention. For example, *Optimum Nutrition* as evidenced by *Costello's* fails to disclose or suggest a method for increasing plasma glutamine concentration in a stressed mammal as required, in part, by Claim 1. *Optimum Nutrition* as evidenced by *Costello's* fails to disclose or suggest a method for providing glutamine to a mammal suffering from injured, diseased or under-developed intestines as required, in part, by Claim 3. In fact, *Optimum Nutrition* as evidenced by *Costello's* fails to disclose or suggest administering its compound to

any stressed or injured/diseased mammal, for example, to increase its plasma glutamine concentration in accordance with the present claims.

In sum, Appellants have discovered the novel way of increasing glutamine levels in mammals by providing nutritional compositions that have relatively low glutamine levels themselves. Appellants have carefully researched the desirability, applicability and levels of protein sources to be effectively used for such increases to occur. Nowhere does *Ballevre* or *Optimum Nutrition* recognize or successfully employ administering to a stressed or injured/diseased mammals the claimed nutritional products comprising a protein source having at least 80% by weight of a whey protein or a protein mixture which simulates the amino acid profile of whey protein to increase glutamine levels in the mammals. As a result, the cited references, alone or in combination, do not teach, suggest, or even disclose all of the elements of independent Claims 1 and 3 and the claims that depend from Claims 1 and 3, and thus, fail to render the claimed subject matter obvious.

For at least the reasons discussed above, the cited references are not properly combinable and/or fail to disclose or suggest every element of the present claims. Accordingly, Appellants respectfully submit that Claims 1-3 and Claims 4-16 that depend from Claims 1-3 are novel, nonobvious and distinguishable from the cited references and are in condition for allowance.

VIII. CONCLUSION

Appellants respectfully submit that the Examiner has failed to establish anticipation under 35 U.S.C. §102 and a *prima facie* case of obviousness under 35 U.S.C. §103 with respect to the rejections of Claims 1-16. Accordingly, Appellants respectfully submit that the anticipation and obviousness rejections are erroneous in law and in fact and should therefore be reversed by this Board.

A check in the amount of $500 is submitted herewith to cover the cost of the Appeal Brief. The Director is authorized to charge any additional fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-036 on the account statement.

Respectfully submitted,

BELL, BOYD & LLOYD LLC

BY _____

Robert M. Barrett
Reg. No. 30,142
Customer No. 29157

Dated: July 3, 2007

CLAIMS APPENDIX

PENDING CLAIMS ON APPEAL OF U.S. PATENT APPLICATION SERIAL NO. 09/646,748

1. A method for increasing plasma glutamine concentration in a stressed mammal, the method comprising the step of administering to the stressed mammal a nutritional composition including a protein source having at least 80% by weight of a component selected from the group consisting of whey protein, and a protein mixture which simulates the amino acid profile of whey protein consisting of approximately 80% to about 90% by weight of casein, approximately 0.5% to about 2% by weight of isoleucine, about 2% to about 8% by weight of leucine, about 1% to about 5% by weight of cysteine, and about 1% to about 5% by weight of lysine.

2. A method for increasing muscle glutamine concentrations in a mammal, the method comprising the step of administering to the mammal a nutritional composition including a protein source having at least 80% by weight of a component selected from the group consisting of whey protein, and a protein mixture which simulates the amino acid profile of whey protein consisting of approximately 80% to about 90% by weight of casein, approximately 0.5% to about 2% by weight of isoleucine, about 2% to about 8% by weight of leucine, about 1% to about 5% by weight of cysteine, and about 1% to about 5% by weight of lysine.

3. A method for providing glutamine to a mammal suffering from injured, diseased or under-developed intestines, the method comprising the step of administering to the mammal a nutritional composition including a protein source having at least 80% by weight of a component selected from the group consisting of whey protein, and protein mixture which simulates the amino acid profile of whey protein consisting of approximately 80% to about 90% by weight of casein, approximately 0.5% to about 2% by weight of isoleucine, about 2% to about 8% by weight of leucine, about 1% to about 5% by weight of cysteine, and about 1% to about 5% by weight of lysine.

4. The method of Claim 3 wherein the mammal is a pre-term infant having an under-developed intestine.

5. The method of Claim 4 wherein the whey protein is hydrolyzed and the protein source further comprises arginine, tyrosine and histidine.

6. The method of Claim 1 wherein the whey protein is hydrolyzed whey protein.

7. The method of Claim 6 wherein the hydrolyzed whey protein contains less than about 5% by weight of free amino acids, about 15% to about 55% by weight of peptides having a molecular weight of less than 1000 Da, about 20% to about 55% by weight of peptides having a molecular weight of 1000 Da to 5000 Da, and about 15% to about 35% by weight of peptides having a molecular weight of greater than 5000 Da.

8. The method of Claim 1 wherein the protein source provides about 10% to about 20% of the energy of the nutritional composition.

9. The method of Claim 1 wherein the nutritional composition further includes a lipid source which provides about 20% to about 50% of the energy of the nutritional composition, the lipid source comprising a mixture of medium chain and long chain fatty acids.

10. The method of Claim 1 wherein the nutritional composition further includes a carbohydrate source which provides about 35% to about 65% of the energy of the nutritional composition.

11. The method of Claim 2 wherein the protein source provides about 10% to about 20% of the energy of the nutritional composition.

12. The method of Claim 2 wherein the nutritional composition further includes a lipid source which provides about 20% to about 50% of the energy of the nutritional composition, the lipid source comprising a mixture of medium chain and long chain fatty acids.

13. The method of Claim 2 wherein the nutritional composition further includes a carbohydrate source which provides about 35% to about 65% of the energy of the nutritional composition.

14. The method of Claim 3 wherein the protein source provides about 10% to about 20% of the energy of the nutritional composition.

15. The method of Claim 3 wherein the nutritional composition further includes a lipid source which provides about 20% to about 50% of the energy of the nutritional composition, the lipid source comprising a mixture of medium chain and long chain fatty acids.

16. The method of Claim 3 wherein the nutritional composition further includes a carbohydrate source which provides about 35% to about 65% of the energy of the nutritional composition.

EVIDENCE APPENDIX

EXHIBIT A: Final Office Action dated October 16, 2006

EXHIBIT B: Advisory Action dated February 6, 2007

EXHIBIT C: 100% Whey Proteins 5 lbs by Optimum Nutrition ("*Optimum Nutrition*"), cited by the Examiner in the Office Action dated October 16, 2006

EXHIBIT D: U.S. Patent No. 5,849,335 to Ballevre et al. ("*Ballevre*"), cited by the Examiner in the Office Action dated October 16, 2006

EXHIBIT E: The publication by Costello's ("*Costello's*"), cited by the Examiner in the supplemental Office Action dated May 8, 2006)

EXHIBIT F: Web page of www.bodybuilding.com/store/opt/print.php taken on January 2, 2007

RELATED PROCEEDINGS APPENDIX

None